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other person whose security holders are voting or consenting; or

(ii) Such plan or agreement provides for a pro rata or similar distribution of such securities to the security holders voting or consenting; or

(iii) The board of directors or similar representatives of such corporation or other person, adopts resolutions relative to paragraph (a)(3) (i) or (ii) of this section within 1 year after the taking of such vote or consent; or

(iv) The transfer of assets is a part of a preexisting plan for distribution of such securities, notwithstanding paragraph (a)(3) (i), (ii), or (iii) of this section.

(b) *Communications before a Registration Statement is filed.* Communications made in connection with or relating to a transaction described in paragraph (a) of this section that will be registered under the Act may be made under § 230.135, § 230.165 or § 230.166.

(c) *Persons and parties deemed to be underwriters.* For purposes of this section, any party to any transaction specified in paragraph (a) of this section, other than the issuer, or any person who is an affiliate of such party at the time any such transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with any such transaction, shall be deemed to be engaged in a distribution and therefore to be an underwriter thereof within the meaning of section 2(11) of the Act. The term *party* as used in this paragraph (c) shall mean the corporations, business entities, or other persons, other than the issuer, whose assets or capital structure are affected by the transactions specified in paragraph (a) of this section.

(d) *Resale provisions for persons and parties deemed underwriters.* Notwithstanding the provisions of paragraph (c), a person or party specified therein shall not be deemed to be engaged in a distribution and therefore not to be an underwriter of registered securities acquired in a transaction specified in paragraph (a) of this section if:

(1) Such securities are sold by such person or party in accordance with the provisions of paragraphs (c), (e), (f) and (g) of § 230.144;

(2) Such person or party is not an affiliate of the issuer, and a period of at least one year, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction, and the issuer meets the requirements of paragraph (c) of § 230.144; or

(3) Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and a period of at least two years, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction.

(e) *Definition of person.* The term *person* as used in paragraphs (c) and (d) of this section, when used with reference to a person for whose account securities are to be sold, shall have the same meaning as the definition of that term in paragraph (a)(2) of § 230.144.

(Secs. 2(11), 4(1), 4(4), 19(a), 48 Stat. 74, 77, 85; sec. 209, 48 Stat. 908; secs. 1-4, 68 Stat. 683; sec. 12, 78 Stat. 580; sec. 308(a)(2), 90 Stat. 57; 15 U.S.C. 77b(11), 77d(1), 77d(4), 77s(a))

[37 FR 23636, Nov. 7, 1972, as amended at 49 FR 5921, Feb. 16, 1984; 50 FR 19016, May 6, 1985; 50 FR 48382, Nov. 25, 1985; 55 FR 17944, Apr. 30, 1990; 62 FR 9245, Feb. 28, 1997; 64 FR 61449, Nov. 10, 1999]

§ 230.146 Rules under section 18 of the Act.

(a) *Prepared by or on behalf of the issuer.* An offering document (as defined in Section 18(d)(1) of the Act [15 U.S.C. 77r(d)(1)]) is "prepared by or on behalf of the issuer" for purposes of Section 18 of the Act, if the issuer or an agent or representative:

(1) Authorizes the document's production, and

(2) Approves the document before its use.

(b) *Covered securities for purposes of Section 18.* (1) For purposes of Section 18(b) of the Act (15 U.S.C. 77r), the Commission finds that the following national securities exchanges, or segments or tiers thereof, have listing standards that are substantially similar to those of the New York Stock Exchange ("NYSE"), the American Stock Exchange ("Amex"), or the National Market System of the Nasdaq Stock

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Market ("Nasdaq/NMS"), and that securities listed on such exchanges shall be deemed covered securities:

(i) Tier I of the Pacific Exchange, Incorporated;

(ii) Tier I of the Philadelphia Stock Exchange, Incorporated; and

(iii) The Chicago Board Options Exchange, Incorporated.

(2) The designation of securities in paragraphs (b)(1) (i) through (iii) of this section as covered securities is conditioned on such exchanges' listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, Amex, or Nasdaq/NMS.

[62 FR 24573, May 6, 1997, as amended at 63 FR 3035, Jan. 21, 1998]

§ 230.147 "Part of an issue", "person resident", and "doing business within" for purposes of section 3(a)(11).

PRELIMINARY NOTES: 1. This rule shall not raise any presumption that the exemption provided by section 3(a)(11) of the Act is not available for transactions by an issuer which do not satisfy all of the provisions of the rule.

2. Nothing in this rule obviates the need for compliance with any state law relating to the offer and sale of the securities.

3. Section 5 of the Act requires that all securities offered by the use of the mails or by any means or instruments of transportation or communication in interstate commerce be registered with the Commission. Congress, however, provided certain exemptions in the Act from such registration provisions where there was no practical need for registration or where the benefits of registration were too remote. Among those exemptions is that provided by section 3(a)(11) of the Act for transactions in *any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within * * * such State or Territory*. The legislative history of that Section suggests that the exemption was intended to apply only to issues genuinely local in character, which in reality represent local financing by local industries, carried out through local investment. Rule 147 is intended to provide more objective standards upon which responsible local businessmen intending to raise capital from local sources may rely in claiming the section 3(a)(11) exemption.

All of the terms and conditions of the rule must be satisfied in order for the rule to be available. These are: (i) That the issuer be a resident of and doing business within the state or territory in which all offers and

sales are made; and (ii) that no part of the issue be offered or sold to non-residents within the period of time specified in the rule. For purposes of the rule the definition of *issuer* in section 2(4) of the Act shall apply.

All offers, offers to sell, offers for sale, and sales which are part of the same issue must meet all of the conditions of Rule 147 for the rule to be available. The determination whether offers, offers to sell, offers for sale and sales of securities are part of the same issue (i.e., are deemed to be *integrated*) will continue to be a question of fact and will depend on the particular circumstances. See Securities Act of 1933 Release No. 4434 (December 6, 1961) (26 FR 9158). Securities Act Release No. 4434 indicated that in determining whether offers and sales should be regarded as part of the same issue and thus should be integrated any one or more of the following factors may be determinative:

(i) Are the offerings part of a single plan of financing;

(ii) Do the offerings involve issuance of the same class of securities;

(iii) Are the offerings made at or about the same time;

(iv) Is the same type of consideration to be received; and

(v) Are the offerings made for the same general purpose.

Subparagraph (b)(2) of the rule, however, is designed to provide certainty to the extent feasible by identifying certain types of offers and sales of securities which will be deemed not part of an issue, for purposes of the rule only.

Persons claiming the availability of the rule have the burden of proving that they have satisfied all of its provisions. However, the rule does not establish exclusive standards for complying with the section 3(a)(11) exemption. The exemption would also be available if the issuer satisfied the standards set forth in relevant administrative and judicial interpretations at the time of the offering but the issuer would have the burden of proving the availability of the exemption. Rule 147 relates to transactions exempted from the registration requirements of section 5 of the Act by section 3(a)(11). Neither the rule nor section 3(a)(11) provides an exemption from the registration requirements of section 12(g) of the Securities Exchange Act of 1934, the anti-fraud provisions of the federal securities laws, the civil liability provisions of section 12(2) of the Act or other provisions of the federal securities laws.

Finally, in view of the objectives of the rule and the purposes and policies underlying the Act, the rule shall not be available to any person with respect to any offering which, although in technical compliance with the rule, is part of a plan or scheme by such person to make interstate offers or sales of securities. In such cases registration pursuant to the Act is required.